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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1175

R. V. McGINNIS THEATRES & PAY T. V., INC.,
Petitioner,

vs.

VIDEO INDEPENDENT THEATRES, INC., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1175

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported in 386 F. 2d 592 and is reprinted in the Appendix to this brief at pp. 1a-6a. The opinion of the United States District Court for the Northern District of Oklahoma is reported in 262 F. Supp. 607 and is reprinted in the Appendix to this brief at pp. 7a-21a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 28, 1967. The jurisdiction of this Court was invoked under 28 U. S. C. Section 1254(1). The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. Sections 15, 26.

STATUTES AND RULE INVOLVED

The Oklahoma statutes involved are 68 O. S. 1965 Supp., Section 1212(a), (c) and (f) and 18 O. S. 1961 Section 1.198a. Also involved is Rule 17(b) of the Federal Rules of Civil Procedure. The texts of the applicable Oklahoma statutes and Rule 17(b) are set forth in the Appendix to this brief at pp. 22a-24a.

QUESTION PRESENTED

Petitioner does not accurately set forth the question presented. The actual question presented is:

Does the doctrine of *Erie R. Co.* v. *Tompkins* require a Federal District Court sitting in Oklahoma to accept, with controlling effect, an administrative construction of Oklahoma statutes by the Oklahoma Tax Commission, where (a) the Oklahoma state courts have not yet construed the statutes in question, (b) the Tax Commission's administrative construction of the statutes would not be controlling upon Oklahoma state courts, and (c) the Federal District Court found such administrative construction to be unauthorized by and contrary to the explicit provisions of the statutes?

STATEMENT OF THE CASE

Prior to April 26, 1963, Petitioner was an Oklahoma corporation. On that day, Petitioner's corporate charter was revoked and cancelled, pursuant to Oklahoma law, because of Petitioner's failure to pay the Oklahoma corporation franchise taxes (C. A. App. 44)*. Petitioner thereupon became legally dead.

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*References to the Appendix in the Court of Appeals will be referred to herein as "C. A. App." The Appendix to this brief will be referred to hereafter as "A."

Rule 17(b) of the Federal Rules of Civil Procedure provides that the capacity of a corporation to sue must be determined by the law under which it was organized (A. 24a). Oklahoma law denies to a dead corporation the right to sue. Thus, when this action was commenced in 1964, Petitioner clearly lacked capacity to sue.

In 1965, Petitioner sought to regain its corporate life by making a post-mortem payment of the unpaid taxes and obtained a purported Order of Reinstatement from the Oklahoma Tax Commission (C. A. App. 46-48). According to Petitioner, this Order of Reinstatement retroactively restored to Petitioner its capacity to sue (Petition, pp. 6-7).

The District Court held, however, that the Oklahoma statutes did not authorize the reinstatement of a corporation whose charter had been revoked and cancelled; that the Oklahoma Tax Commission's Order of Reinstatement was without statutory authority and was void; and that Petitioner had not regained its capacity to sue. Accordingly, the District Court dimissed the complaint. The order of dimissal was affirmed by the Court of Appeals and the Petition for Certiorari followed.

Petitioner does not, in this Court, dispute the conclusion reached by the courts below that the revocation and cancellation of Petitioner's charter on April 26, 1963, effected a termination of Petitioner's existence as a legal entity. Nor does Petitioner here dispute the conclusion that it lacked capacity to sue on August 7, 1964, the date when the present action was commenced in the District Court.

Petitioner here relies exclusively on the purported 1965 Order of Reinstatement from the Oklahoma Tax Commission as retroactively restoring to it the capacity to sue. As noted above, however, both the District Court (A. 21a) and the Court of Appeals (A. 6a), after an extensive examination of the Oklahoma statutes, reached the conclusion

that the Oklahoma Tax Commission was not authorized by law to reinstate a corporation whose charter had been revoked and cancelled; that the purported 1965 Order of Reinstatement, therefore, was void; that Petitioner continued to be legally dead; and that it still lacked capacity to sue.

The reasons which led the courts below to reach these conclusions are fully set forth in the opinions appended to this brief (A. 1a-21a). These opinions correctly state and apply the controlling Oklahoma statutes.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

Even Petitioner does not seriously contend that the construction accorded the Oklahoma statutes by the courts below was incorrect, and Petitioner's formulation of the "Questions Presented" does not even raise that issue. The most that Petitioner asserts in its "Questions Presented" is that the Tax Commission's administrative act in issuing the 1965 reinstatement order constituted a "reasonable interpretation" of the Oklahoma statutes (Petition p. 2). In any event, the correctness of the construction given the relevant Oklahoma statutes by the courts below does not present an issue which this Court will ordinarily review. *Pierson* v. *Ray,* 386 U. S. 547, 558; *Huddleston* v. *Dwyer,* 322 U. S. 232, 237.

II.

Petitioner's principal argument in this Court centers around the contention that under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the purported Oklahoma Tax Commission Order of Reinstatement constituted a construction of the relevant Oklahoma statutes which was binding and conclusive upon the Federal court; that it was not

permissible for a Federal court, charged with the duty of applying Rule 17(b), to itself examine, construe or apply the relevant Oklahoma statutes in order to determine the validity of the Oklahoma Tax Commission Order.

Petitioner argues, in effect, that no matter how arbitrary, unreasonable or contrary to law the action of the Oklahoma Tax Commission might be, a Federal court was required blindly to follow it; that the failure of the courts below to do so here calls for the corrective intervention of this Court (Petition p. 16).

In fact, however, the courts below proceeded in a manner fully consistent with the requirements of *Erie* and the decisions below raise no issue which would necessitate or justify the granting of certiorari.

It should be noted, at the outset, that the courts below did not ignore the construction apparently accorded the relevant Oklahoma statutes by the Tax Commission. Rather, they carefully considered and explicitly rejected that construction because it was clearly incorrect. Thus the District Court held (A. 20a):

> *"While this Court recognizes that departmental or executive construction of a statute or statutes should be given great weight, such construction should not stand where inconsistent with the legislative intent.* There is a presumption in law that every provision of a statute is intended for some useful purpose and should be given effect. Hunt vs. Washington Fire and Marine Insurance Company (Okl.), 381 P. 2d 844. *To give full effect in this case to the executive or departmental interpretation of Section 1212(f) would have the effect of repealing Section 1.198a, supra.* Statutes must be construed together if possible, and effect given to the meaning of both. There is no room

for interpretation of a statute or statutes which are not ambiguous or inconsistent with each other. The statutes involved in this case are consistent and can and should stand together, as heretofore outlined by this Court." (Emphasis added.)

Similarly, the Court of Appeals held (A. 4a):

"McGinnis concedes that no Oklahoma court has passed on the question presented but argues that the federal courts must recognize the revival by the state commission under the principle which requires them to apply state law and 'ascertain from all available data what the state law is.' The answer is that revival of a corporation depends on statutory authority. In Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U. S. 120, 125, the Court said that: 'There must be some statutory authority for the prolongation of [corporate] life, even for litigation purposes.' *Although administrative construction of an ambiguous statute is entitled to weight, that construction is not to be adopted if a different construction is plainly required. If administrative construction of a statute is clearly wrong, it is the duty of the court so to adjudge.*" (Emphasis added.) (Footnotes omitted.)

And further (A. 5a-6a):

"McGinnis emphasizes the rule that a 'corporation can come to an end and its life extinguished only by the act or with the consent of the sovereign power by which it was established.' Here the corporate life was extinguished by an official act taken under a statute of the sovereign which created the corporation. The authority to revive must have similar

> statutory support. In our opinion that authority cannot be found in any fair interpretation of the applicable statutes. *A court must reject an agency construction of a statute when that construction is obviously wrong.*" (Emphasis added.) (Footnotes omitted.)

In urging that the courts below were required to follow, without question, the erroneous construction apparently accorded the relevant Oklahoma statutes by the Tax Commission, Petitioner misconceives the *Erie* doctrine.

While the doctrine of *Erie* requires the Federal courts to decide questions of state law in the same way as those questions would be decided by the highest state courts, it does not relieve the Federal courts from independently determining questions of state law particularly where, as here, the highest court of the state has not yet spoken. In such circumstances, the doctrine of *Erie* affirmatively requires the Federal court to undertake its own examination of state law to determine the answer which the highest state court would probably give. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204-05; *King* v. *Order of Travelers*, 333 U. S. 153, 160-61, *reh. denied*, 333 U. S. 878; *Markham* v. *Allen*, 326 U. S. 490, 495; *Meredith* v. *Winter Haven*, 320 U. S. 228, 237; *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 236-37.

The applicable principles have recently been summarized by this Court in *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465:

> ". . . in diversity cases this Court has further held that while the decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling . . .' where the highest court of the State has not spoken on the point. *King* v. *Order of Travelers, supra*, at 160-161. And in *West* v.

> *A. T. & T. Co.*, 311 U. S. 223 (1940), this Court further held that 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*' At 237. (Emphasis supplied.) Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of *Erie R. Co.* v. *Tompkins, supra,* where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz,* the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956)."

In accordance with these principles, the lower Federal courts have consistently held that while decisions of inferior state judicial tribunals, administrative rulings and the like are data which a Federal court may properly examine in order to determine the answer to a question of state law, they are not, in any sense, controlling. *Royal Indemnity Company* v. *Clingan,* 364 F. 2d 154, 158 (6th Cir. 1966);

Old Kent Bank & Trust Company v. *United States,* 362 F. 2d 444, 449-50 (6th Cir. 1966); *Pierpont* v. *C. I. R.,* 336 F. 2d 277, 281 (4th Cir. 1964), *cert. denied,* 380 U. S. 908; *Shelp* v. *National Surety Corporation,* 333 F. 2d 431 (5th Cir. 1964), *cert. denied,* 379 U. S. 945; *American Fidelity & Cas. Co.* v. *Indemnity Ins. Co. of No. Amer.,* 308 F. 2d 697, 699-700 (6th Cir. 1962), *cert. denied,* 372 U. S. 942; *Strubbe* v. *Sonnenschein,* 299 F. 2d 185, 188-89 (2d Cir. 1962); *National Foam System* v. *Urquhart,* 202 F. 2d 659, 661 (3rd Cir. 1953); *Mogis* v. *Lyman-Rickey Sand & Gravel Corp.,* 189 F. 2d 130, 139-40 (8th Cir. 1951); *Lowe* v. *Socony Mobil Oil Co.,* 222 F. Supp. 624, 626 (D. Ore. 1963); *United States* v. *3 Parcels of Land in Woodbury Co., Iowa,* 198 F. Supp. 529, 535 (N. D. Ia. 1961).

The fallacy of Petitioner's contention that the construction apparently accorded the Oklahoma statutes by the Tax Commission is binding upon the Federal courts becomes patent when it is recognized that the administrative act of the Tax Commission upon which Petitioner here relies would not be binding even in the Oklahoma state courts. *Boydston* v. *State,* 277 P. 2d 138 (Okla. 1954); *Shires* v. *Reynolds,* 208 Okla. 287, 255 P. 2d 491 (1953); *Special Indemnity Fund* v. *Prewitt,* 201 Okla. 308, 205 P. 2d 306 (1948). See also *Standard Surety & Casualty Co.* v. *State of Oklahoma,* 145 F. 2d 605 (10th Cir. 1944).

As this Court said in *King* v. *Order of Travelers,* 333 U. S. 153, 161:

> "Furthermore, as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, 'in effect, only another court of the State'; it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."

The decisions—including those cited by Petitioner—are unanimous that administrative construction of state law

is not binding upon the Federal courts. Thus, the refusal of the courts below to consider themselves bound by the erroneous construction apparently accorded the releyant Oklahoma statutes by the Tax Commission presents nothing which is novel, unusual, or in any way inconsistent with the doctrine of *Erie R. Co.* v. *Tompkins.*

III.

Petitioner's contention that a Federal court may not overrule a "reasonable" interpretation of a state statute by a state administrative agency is wholly inconsistent with the doctrine of *Erie,* the very doctrine which Petitioner here seeks to invoke. As demonstrated above, the proper inquiry under *Erie* is not whether the administrative construction is "reasonable"; the inquiry is whether that construction would be adopted by the highest court of the state.

The opinions below demonstrate that the Tax Commission's apparent administrative construction here relied upon by Petitioner is not a reasonable construction and most likely would not be adopted by Oklahoma state courts. As the District Court stated: "To give full effect in this case to the executive or departmental interpretation of Section 1212(f) would have the effect of repealing Section 1.198a, supra" (A. 20a).

IV.

Although not set forth in its "Questions Presented", Petitioner argues in this Court (Petition pp. 23-24) that certain of the respondents are estopped to deny the corporate existence of Petitioner. This contention may be disposed of summarily. As was stated by the Court of Appeals (A. 6a):

> "The estoppel claim presented in the reply brief of McGinnis is not properly before us because it had not been raised previously."

In any event, the estoppel argument is wholly without merit. *James* v. *Unknown Trustees,* 203 Okla. 312, 220 P. 2d 831 (1950); 68 O. S. 1965 Supp. § 12-1212(c). Certainly it does not present an issue upon which this Court should grant certiorari.

CONCLUSION

There is no issue in this case which warrants the attention of this Court. It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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March 25, 1968

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 9443—NOVEMBER TERM, 1967

R. V. McGINNIS THEATRES & PAY T. V., INC.,
Appellant,

v.

VIDEO INDEPENDENT THEATRES, INC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

W. Bradley Ryan (Guterman, Horvitz & Rubin were with him on the brief) for Appellant.

Edward Soule (Lytle, Soule & Emery; Stanley Godofsky of Royall, Koegel, Rogers & Wells; Coleman Hayes; John J. Galgay of Regan, Goldfarb, Powell & Union; J. Warren Jackman; Jack I. Gaither; and Pat Malloy were with him on the brief) for Appellees.

Before LEWIS, BREITENSTEIN, and HILL, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Opinion

The issue is the capacity of appellant-plaintiff McGinnis to maintain a suit against the appellees-defendants for alleged violations of the Sherman and Clayton Antitrust Acts. McGinnis was incorporated in Oklahoma in 1958. This suit was commenced on August 7, 1964. The defendants attack the capacity of McGinnis to sue on the ground that its charter had been revoked and cancelled on April 26, 1963. McGinnis relies on the fact that the charter was reinstated on January 29, 1965. The trial court held that McGinnis lacked the necessary capacity and this appeal followed.

Rule 17(b), F.R.Civ.P., provides that the capacity of a corporation to sue "shall be determined by the law under which it was organized." The Oklahoma statutes impose a franchise tax on corporations. In 68 O.S. 1961, § 644.13(1), it is said that if the tax is not paid when due the Oklahoma Tax Commission

> "* * * may enter an order directing the suspension of the charter * * * and the forfeiture of all corporate or other rights inuring thereunder."

Pursuant to this statute McGinnis was notified on April 26, 1962 that because of nonpayment of the tax, its charter was suspended and all rights thereunder were forfeited.

The statutes, 18 O.S. 1961, § 1.198a, provide that upon submission of proof of payment of the tax within one year, the suspension may be revoked and say further:

> "But if the corporation does not, within the year's time indicated above, present such proof, the Secretary of State shall revoke and cancel the Articles of Incorporation * * * after mailing to the corporation, thirty (30) days prior to the expiration of the year's time, a notice that such revocation and cancellation will occur on a date stated in the notice."

McGinnis did not pay within the year and on March 26, 1963, the Secretary of State sent to it the following notice of revocation and cancellation:

> "Pursuant to notice heretofore given under the provisions of Title 18, Section 1.198a, O.S. 1961, you are hereby notified that the Articles of Incorporation of the above corporation will be revoked and cancelled by the Secretary of State of Oklahoma 26th day of April, 1963 for failure to comply with the requirements of the Oklahoma Franchise Tax Law."

The Oklahoma statutes also provide that after the issuance of an order of suspension and forefeiture the charter may be revived or reinstated only by the payment of specified fees and penalties and that (68 O.S. 1963 Supp. § 12-1212(f)):

> "Such payment of accrued fees and penalties must be made prior to the expiration of the time provided in such charter * * * for the life of such corporation * * *."

The charter life of McGinnis was fifty years from 1958. On January 29, 1965, after this suit was brought, the Commission found that the accrued taxes and fees were paid and ordered that:

> "* * * the corporate rights [of McGinnis] * * * be and the same are, hereby reinstated, and that the action of the Oklahoma Tax Commission in its Order Number 47561, dated March 26, 1962, insofar as same relates to the aforesaid corporation, be vacated, set aside and held for naught."

Section 12-1212(c), 68 O.S. 1963 Supp., provides that after a corporation's right to do business has been forfeited it "shall be denied the right to sue or defend in any court of this State."

McGinnis concedes that no Oklahoma court has passed on the question presented but argues that the federal courts must recognize the revival by the state commission under the principle which requires them to apply state law and "ascertain from all available data what the state law is."[1] The answer is that revival of a corporation depends on statutory authority. In Chicago Title & Trust Co. v. Forty-one Thirty-six Wilcox Bldg. Corp., 302 U. S. 120, 125, the Court said that: "There must be some statutory authority for the prolongation of [corporate] life, even for litigation purposes."[2] Although administrative construction of an ambiguous statute is entitled to weight, that construction is not to be adopted if a different construction is plainly required.[3] If administrative construction of a statute is clearly wrong, it is the duty of the court so to adjudge.[4]

McGinnis relies on § 1212(f) and the defendants on § 1.198a. These must be read together and with § 644.13(1). The last section says that if the tax is not paid the charter is suspended and all rights thereunder forfeited. Section 1.198a provides for "revocation and cancellation" if the tax is not paid within one year. Section 1212(f) permits revival after "suspension and forfeiture." We do not equate "revocation and cancellation" with "suspension and forfeiture."

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[1]West v. American Tel. & Tel. Co., 311 U. S. 223, 237.

[2]To the same effect see United States v. Safeway Stores, Inc., 10 Cir., 140 F. 2d 834, 836.

[3]See Standard Surety & Casualty Co. of New York v. Oklahoma ex rel. Thilsted, 10 Cir., 145 F. 2d 605, 608.

[4]See Hampton v. Ewert, 8 Cir., 22 F. 2d 81, 90, cert. denied 276 U. S. 623, an Oklahoma case arising before the creation of the Tenth Circuit.

The terms have different meanings and were used with precision in the statutes. "Suspension and forfeiture" occur when the tax is not paid. "Revocation and cancellation" occur when the tax remains unpaid for a year. The two statutes were passed by the same legislature and must be read together if there is any reasonable way to do so.[5] Section 1212(f) operates only after "suspension and forfeiture." Nothing therein authorizes revival or reinstatement after "revocation and cancellation." Here the taxes were not paid within the year and, in accordance with § 1.198a the charter was revoked and cancelled by the Secretary of State.

The decisions on which McGinnis relies are not pertinent. Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, related to the substitution of a successor corporation for a dissolved corporation and the Court declined to act without a clarification of an Oklahoma decision in the light of Oklahoma statutes. Lillard v. Lonergan, 10 Cir., 72 F. 2d 865, cert. denied 293 U. S. 615, was concerned with conflicting state and federal jurisdiction over the appointment of receivers for a Kansas corporation. Decisions like Watts v. Liberty Royalties Corp., 10 Cir., 106 F. 2d 941, which apply state laws not analogous to those of Oklahoma, are not pertinent. The fact that the statutes relating to the corporate franchise tax and to the results of nonpayment have a revenue-raising objective cannot defeat or change the wording of the statutes.

McGinnis emphasizes the rule that a "corporation can come to an end and its life extinguished only by the act or with the consent of the sovereign power by which it was established."[6] Here the corporate life was extinguished

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[5]Section 1212(f) was enacted on February 25, 1949, and § 1.198a on June 6, 1949.

[6]16A Fletcher, Cyclopedia, Corporations, Wolf Rev. 1962, p. 14.

by an official act taken under a statute of the sovereign which created the corporation. The authority to revive must have similar statutory support. In our opinion that authority cannot be found in any fair interpretation of the applicable statutes. A court must reject an agency construction of a statute when that construction is obviously wrong.[7]

The estoppel claim presented in the reply brief of McGinnis is not properly before us because it had not been raised previously.

Affirmed.

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[7]United States v. Finnell, 185 U. S. 236, 244.

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

R. V. McGINNIS THEATRES and PAY T. V., INC., a Corporation,
Plaintiff,

vs.

VIDEO INDEPENDENT THEATRES, INC., a Corporation; ADMIRAL DRIVE-IN, a co-partnership; DELMAN THEATRE CORPORATION, a Corporation; MODERN THEATRES, INC., a Corporation; FAMILY THEATRES, INC., a Corporation; PARAMOUNT FILM DISTRIBUTING CORPORATION, a Corporation; METRO-GOLDWYN-MAYER, INC., a Corporation; WARNER BROS. PICTURES DISTRIBUTING CORPORATION, a Corporation; TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation; COLUMBIA PICTURES CORPORATION, a Corporation; UNIVERSAL FILM EXCHANGES, INC., a Corporation; UNITED ARTISTS CORPORATION, a Corporation,
Defendants.

No. 6015 Civil

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PAT MALLOY, Tulsa, Oklahoma, Attorney for Defendant Delman Theatre Corporation.

JACK I. GAITHER, Tulsa, Oklahoma, Attorney for Defendant Admiral Twin Drive-In Theatre, a co-partnership.

Before LUTHER BOHANON, United States District Judge.

This action is brought by the plaintiff against the numerous defendants named in the caption on the theory of a combination or conspiracy among the defendants to violate the Sherman Anti-Trust Act, 15 U. S. C. Secs. 1, 2, and 7, and the Clayton Anti-Trust Act, 15 U. S. C. Secs. 12, 15, 16, and 22. In general the Complaint alleges that the defendants unlawfully entered into a conspiracy or combination with the intent and purpose to limit and control the distribution and exhibition of motion picture films in the State of Oklahoma, particularly in the Tulsa, Oklahoma, area, and in furtherance of said combination or conspiracy committed certain acts to effectuate the purpose thereof.

The narrow question which is now before the Court for consideration is whether the plaintiff corporation has the legal capacity to sue or maintain this action. The plaintiff

is an Oklahoma corporation, and therefore governed by the laws of the State of Oklahoma.

The defendants Paramount, Warner, Columbia, Metro-Goldwyn-Mayer, Twentieth Century Fox, United Artists, and Universal Film have filed a Motion to Dismiss this action upon the ground that the plaintiff ceased to exist and was legally dead under the Oklahoma laws prior to the date this action was commenced; that it did not at that time and does not now have the legal capacity to sue. A like Motion was filed by Admiral Twin Drive-In Theatres. The same issue was raised by the remaining defendants in their respective answers, although stated in somewhat different form, but in substance amounting to the same. The Court in a Pretrial Order filed July 18, 1966, stated that one of the questions to be determined, as a matter of law, was the plaintiff's legal capacity to maintain this action. All of the necessary documents, papers, and orders, are on file in this case, and the question before this Court, as above stated, is ripe for determination.

This action was commenced by the filing of a Complaint August 7, 1964. It is the contention of the defendants that the plaintiff became legally dead on April 26, 1963, by the revocation and cancellation of its Articles of Incorporation, and therefore has no legal capacity to maintain this action.

The Oklahoma Franchise Tax Law, now known as Oklahoma Franchise Tax Code, requires corporations to pay annual Franchise Taxes. 68 O.S. 1961 Sec. 644.1, et seq.; 68 O.S. 1963 Supp. Sec. 12-1201, et seq., 68 O.S. 1965 Supp. Sec. 1201, et seq.

Title 68 O.S. 1961 Sec. 644.13(1) provides:

> "If the report herein required and the tax levied is not filed and paid within the time provided under Paragraph 3, Section 9, the Oklahoma Tax Commis-

> sion shall levy and collect a penalty for such delinquency in the amount of ten per centum (10%) of the tax due. Such penalty shall be collected and apportioned in the same manner as is the tax itself, and the Commission may enter an order directing the suspension of the charter or other instrument of organization, under which the corporation, association or organization may be organized, and the forfeiture of all corporate or other rights inuring thereunder."

In the 1963 Code, this provision became 68 O.S. 1963 Supp. Sec. 12-1212(a) and is now 68 O.S. 1965 Supp. Sec. 1212(a).

The plaintiff having failed to pay its franchise taxes as provided by law, the Oklahoma Tax Commission entered its Order No. 47561, as follows:

> "On this Mar 26 1962, this matter came on for hearing before the Oklahoma Tax Commission, and it appearing from the proof submitted that the domestic corporations mentioned in Schedule A, which is attached hereto, are delinquent in the payment of Franchise Tax to the State of Oklahoma; that due notice of such delinquency has been given to each and all of said domestic corporations, and that notwithstanding said notice such domestic corporations have failed to comply with the requirements of the Oklahoma Franchise Tax Act, Title 68, Chapter 17, O.S. 1951.
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> "The Oklahoma Tax Commission finds that the corporations named in said Schedule A have failed to pay the fees required by the Oklahoma Franchise

Tax Act, and that because of the failure of such domestic corporations to comply with the law of the State of Oklahoma, and pay State license fees as provided for by the Oklahoma Franchise Tax Act, such domestic corporations are in default and that the power, rights, and privileges of such domestic corporations should be incapable of exercising such powers, rights, and privileges in the State of Oklahoma for any purpose or in any manner; that the Oklahoma Tax Commission should transmit the names of such domestic corporations named in the Schedule hereto attached to the Secretary of State.

"IT IS, THEREFORE, ORDERED AND DIRECTED by the Oklahoma Tax Commission that the charter of each and every domestic corporation listed and named in Schedule A, attached hereto and made a part hereof, and the rights, privileges and powers in the State of Oklahoma inuring to each and every such corporation under its charter be, and the same are, hereby suspended.

"IT IS FURTHER ORDERED that the names of each such corporation named herein be immediately transmitted to the Secretary of State, and that notice of such suspension be forwarded by registered mail to the resident agent or managing officer of each such corporation herein named, as provided by law."

This Order was entered on March 26, 1962, and the plaintiff was listed in Schedule A attached to such Order. On the same day, March 26, 1962, the plaintiff was issued a "Notice of Suspension" by the Oklahoma Tax Commission, as follows:

Opinion

"NOTICE OF SUSPENSION

R. V. McGinnis Theatres and Pay T-V, Inc.
R. V. McGinnis
13 West Third St.,
Tulsa, Oklahoma

Dear Sir:

Pursuant to notice heretofore given you under the provisions of the Oklahoma Franchise Tax Act, you are hereby notified that by reason of your failure to comply with the requirements of said Act, the Oklahoma Tax Commission has made and entered its Order directing that notice of your delinquency be transmitted to the Secretary of State of the State of Oklahoma, that proper record may be made to show the suspension of your charter, and the forfeiture of all rights thereunder.

Dated at Oklahoma City, Oklahoma, this 26 day of March, 1962.

Very truly yours,

OKLAHOMA TAX COMMISSION

By
Dewey E. Carpenter, Director
Franchise Tax Division"

The plaintiff was issued a similar Notice of Suspension on April 26, 1962, by the Secretary of State, as follows:

Opinion

"R. V. McGinnis Theatres and Pay T-V, Inc.
R. V. McGinnis
13 West Third Street
Tulsa, Oklahoma

"NOTICE OF SUSPENSION"

Gentlemen:

We have received notice from the Oklahoma Tax Commission of the suspension of your charter on March 26, 1962 for your failure to comply with the Oklahoma Franchise Tax Law.

You are therefore notified that under the provisions of Title 18, Section 1.198a, O.S. 1961, we have suspended the Articles of Incorporation of your corporation on file in this office.

You are further notified that unless proof of reinstatement of your charter with the Oklahoma Tax Commission is received within one (1) year from the date of this notice, the Articles of Incorporation will be revoked and cancelled by this office.

Dated at Oklahoma City, Oklahoma, this 26th day of April, 1962.

Yours very truly,

WILLIAM N. CHRISTIAN
Secretary of State

Jennie Dahlgren
Assistant Secretary of State"

Opinion

Title 18 O. S. 1961 Sec. 1.198a,[1] provides for the revocation and cancellation of Articles of Incorporation of a domestic corporation. The plaintiff, not having paid its taxes within one year as provided by Section 1.198(a), its Articles of Incorporation were cancelled and revoked by the Secretary of State on April 26, 1963, as also provided by Section 1.198(a). At this point it is contended by the defendants that the plaintiff became legally dead and not competent to maintain this action.

Oklahoma provides a procedure for dealing with corporations that have not paid their franchise taxes. This procedure takes two steps: Step One is provided by Section 644.13(1). The Oklahoma Tax Commission, as commanded by the last mentioned section of the Oklahoma Statutes, entered its Order dated March 26, 1962, directing the suspension of the charter of the plaintiff corporation. The Secretary of State, also as provided by the last mentioned statute, notified the plaintiff of this suspension. Under the provisions of this statute of the State of Oklahoma, the plaintiff had one year after the original suspension to furnish

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[1] "Whenever the Secretary of State receives from the Oklahoma Tax Commission any order suspending or forfeiting the charter of or the right of any corporation to do business in this State, as provided in Section 13 of House Bill No. 55 of the Twenty-second Legislature, he shall give notice to the corporation, stating that he has suspended the Articles of Incorporation or Articles of Domestication, as the case may be. If prior to the expiration of one (1) year from the date the notice was sent the corporation presents satisfactory proof that the Oklahoma Tax Commission has, as provided in the Oklahoma Franchise Tax Law, reinstated the charter or right of the corporation to do business in this State, the Secretary of State shall revoke his suspension. But if the corporation does not, within the year's time indicated above, present such proof, the Secretary of State shall revoke and cancel the Articles of Incorporation or Articles of Domestication, as the case may be, after mailing to the corporation, thirty (30) days prior to the expiration of the year's time, a notice that such revocation and cancellation will occur on a date stated in the notice."

satisfactory proof that it had complied with the Oklahoma Tax Commission's Order, by paying its delinquent taxes. The payment of its delinquent taxes within one year in order to be reinstated is Step Two, and it is contended that on April 26, 1963, the taxes not having been paid, plaintiff's charter or Articles of Incorporation, were revoked and cancelled. The Secretary of State, as provided by Section 1.198(a), is required to mail to the corporation, thirty days prior to the expiration of the year's time, a notice that such revocation and cancellation will occur on a date stated in the notice. This notice was so given, as follows:

"R. V. McGinnis Theatres and Pay T-V, Inc.
R. V. McGinnis
13 West Third Street
Tulsa, Oklahoma

"NOTICE OF REVOCATION AND CANCELLATION"

Dear Sir:

Pursuant to notice heretofore given under the provisions of Title 18, Section 1.198a, O.S. 1961, you are hereby notified that the Articles of Incorporation of the above corporation will be revoked and cancelled by the Secretary of State of Oklahoma 26th day of April, 1963 for failure to comply with the requirements of the Oklahoma Franchise Tax Law.

Dated at Oklahoma City, Oklahoma this 26th day of March, 1963.

Yours very truly,

James M. Bullard
Secretary of State"

Opinion

Plaintiff, in its Brief, admits that all of the notices heretofore referred to in this Opinion, were given, as required by law, but contends that the corporation was reinstated prior to the expiration of its charter, as provided by 68 Okla. Stat. Sec. 12-1212(f),[2] and the Oklahoma Tax Commission, pursuant to the authority vested in it by the last-mentioned statute, entered an Order dated January 29, 1965, reinstating said corporation.[3] Thus the plaintiff con-

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[2] "AN ACT

Section 1212(f). After the issuance of such order of suspension and forfeiture by the Tax Commission, the charter or other instrument of organization may only be revived and reinstated upon the payment of the accrued fees and penalties and a reinstatement fee in the amount of Five Dollars ($5.00), and a showing by the corporation, association or organization of a full compliance with the laws of this State. Such payment of accrued fees and penalties must be made prior to the expiration of the time provided in such charter or other instrument of organization for the life of such corporation, association or organization."

[3] "BEFORE THE OKLAHOMA TAX COMMISSION

IN THE MATTER OF THE REINSTATEMENT OF DOMESTIC CORPORATION } ORDER NUMBER 49 688

R. V. McGinnis Theatres & Pay T. V., Inc.
406 S. Main Street
Tulsa, Oklahoma

ORDER

On this Jan 29 1965, the above matter came on for hearing, in regular order, before the Oklahoma Tax Commission and the Commission being fully advised in the premises, finds as follows:

By Order Number 47562, dated March 26, 1962, the Commission directed the suspension of the right to do business in the State of Oklahoma by 'R. V. McGinnis Theatres & Pay T. V., Inc.,' a corporation organized under the laws of Oklahoma on February 19, 1958, because of the failure of said corporation to comply with the requirements of the Oklahoma Franchise Tax Act.

The Commission further finds that the above referred to corporation has, since the date of the above mentioned order, paid all fees

tends that by the Order of the Oklahoma Tax Commission dated January 29, 1965, it fully and completely reinstated the corporation to all of its former rights and authorizations under the Oklahoma law. The defendants contend that the Corporation Commission had no authority to reinstate the corporation after the one-year period as provided in 18 O.S. 1961 Sec. 1.198a, and therefore the Order of the Oklahoma Tax Commisison (Note 3) is void and did not reinstate the corporation.

The authorities cited by the parties are of little assistance to the Court, inasmuch as they arise in other states and under statutes worded quite differently from the Oklahoma Statute. As an example, the plaintiff relies heavily upon Watts vs. Liberty Royalties Corporation (10 Cir. 1939), 106 F. 2d 941. This case analyzes and determines the law of Delaware, and not that of Oklahoma, which is controlling here.

The Oklahoma Tax Commission and the Secretary of State of Oklahoma, by State action, effectively revoked and

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and penalties shown to be due by its Franchise Tax return to *and* including June 30, 1965.'

IT IS THEREFORE, ORDERED by the Oklahoma Tax Commission, that the corporate rights of said 'R. V. McGinnis Theatres & Pay T. V., Inc.,' a corporation be and the same are, hereby reinstated, and that the action of the Oklahoma Tax Commission in its Order Number 47561, dated March 26, 1962, insofar as same relates to the aforesaid corporation, be vacated, set aside and held for naught.

IT IS FURTHER ORDERED that a copy of this order of the Tax Commission be forwarded to the Secretary of State to be placed on record in said office as required by law.

DATED this Jan 29, 1965.

OKLAHOMA TAX COMMISSION

SEAL:
ATTEST:
/s/ Pearl Estas
Assistant Secretary

/s/ J. D. Dunn, Chairman
/s/ L. L. Leininger, Vice-Chairman
/s/ M. C. Connors, Member

APPROVED:
/s/ Albert D. Lynn, Attorney

cancelled the Articles of Incorporation of the plaintiff, and plaintiff thereby became legally dead and could not legally maintain this action, unless under the provisions of 68 O.S. Sec. 12-1212(f) (Note 2) and the Order of the Oklahoma Tax Commission (Note 3), had the legal effect of reinstating the corporation. If the plaintiff corporation was legally and validly reinstated, such reinstatement would relate back to the date of suspension and restore it to all its former powers, including the right to maintain this action. It is therefore necessary to determine the meaning of Section 12-1212(f) heretofore quoted.

The crucial Oklahoma Statutes to be considered and interpreted by the Court are 18 O.S. 1961 Sec. 1.198a (Note 1) and 68 O.S. 1965 Supp. Sec. 12-1212(f) (Note 2). A construction of these two statutes and their relation to each other will determine the isue before this Court. Section 1.198a was enacted by the 1949 Legislature June 6, 1949, and Section 1212(f) was enacted by the same 1949 Legislature February 25, 1949. Statutes must be read and construed together to give effect to both, and the words of each, if it can be done, without violance to either.

This Court does not find from a reading of these two statutes that a conflict exists. Each statute provides a limitation of time. Section 1.198a, provides a limitation of one year for reinstatement, while Section 1212(f) provides for a further limitation that a corporation cannot be reinstated after its charter life expires. Assuming the one year provided by Section 1.198a would expire December 1, 1966, but the charter life of the corporation expired September 1, 1966, then the corporation would not have a full year to become reinstated but would have only until September 1, because of Section 1212(f). If, however, the charter life would

not expire until December 20, the corporation would have until December 1 to be reinstated, because the one year provided by Section 1.198a, would then expire. Both of these statutes provide a time limit, and a corporation is limited to whichever time occurs first.

In the case of the plaintiff corporation here, the charter life was fifty years from 1958, so Section 1212(f) does not come into play to enlarge the reinstatement period provided by Section 1.198a. Plaintiff's reliance upon Section 1212(f) is misplaced because that statute does not extend the one-year period provided by Section 1.198a, but simply imposes an additional limitation.

In enacting these two laws, it should be presumed that the 1949 Legislature intended that both such enactments would be effective. They must be read and construed so as to give effect to both, if possible.

The Supreme Court of Oklahoma, in Forston vs. Heisler, (1959) 341 P. 2d 252, held:

> "In the construction of the statutes, harmony, not confusion, is to be sought. The true rule has often been said to be that, where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict."

See also Rogers vs. Oklahoma Tax Commission, 263 P. 2d 409.

The plaintiff in its Brief indicates that the construction placed upon the two statutes involved in this case by the Oklahoma Tax Commission should be given effect; that by

the Order of the Oklahoma Tax Commission reinstating the plaintiff corporation after the expiration of the one year provided by Section 1.198a should be controlling. While this Court recognizes that departmental or executive construction of a statute or statutes should be given great weight, such construction should not stand where inconsistent with the legislative intent. There is a presumption in law that every provision of a statute is intended for some useful purpose and should be given effect. Hunt vs. Washington Fire and Marine Insurance Company (Okl.), 381 P. 2d 844. To give full effect in this case to the executive or departmental interpretation of Section 1212(f) would have the effect of repealing Section 1.198a, supra. Statutes must be construed together if possible, and effect given to the meaning of both. There is no room for interpretation of a statute or statutes which are not ambiguous or inconsistent with each other. The statutes involved in this case are consistent and can and should stand together, as heretofore outlined by this Court.

It should be specifically noted that Section 1.198a, although enacted by the same legislature, was put into law after Section 1212(f), and where such is the situation, if an ambiguity exists the statute last enacted becomes the law and the former statute must give way to the latter.

In the case of Poafpybitty, et al. vs. Skelly Oil Company (Okl.), 394 P. 2d 515, at page 519, the Court said:

> "Where there are two or more acts or provisions of law relating to the same subjects, effect is to be given to both, if that be practicable, but if a repugnancy exists between such provisions, the more recent act, which is the latest expression of the legislative will, will operate as a repeal of the former to

the extent of the repugnancy. 75 O.S. 1961 Sec. 22; Dunlap vs. Board of County Commissioners of Carter County, et al., 85 Okl. 295, 205 P. 1100, 1103. * * *"

See also to the same effect United States vs. Mullendore, et al. (10 Cir.), 35 F. 2d 78; Hines, et al. vs. Harmon (Okl.), 61 P. 2d 641; Consumers Co-op Association, et al. vs. Titus, et al. (Okl.), 205 P. 1162.

In line with the interpretation of the statutes involved in this case, the Court holds that the plaintiff corporation was legally dead prior to and at the time of the institution of this action; further, that plaintiff's Articles of Incorporation were effectively revoked and cancelled by the Secretary of State under Section 1.198a, supra; that there is no statutory authority for reinstatement of a corporation such as the plaintiff after the expiration of the one year provided by the last mentioned statute, and that the Order of Reinstatement issued by the Oklahoma Tax Commission (Note 3) was without legal authority, and is therefore void.

An Order will be entered sustaining the defendants' Motion to Dismiss.

DATED this 4th day of January, 1967.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

STATUTES AND RULE INVOLVED

68 O. S. 1965 Supp. § 1212

"(a) If the report herein required and the tax levied is not filed and paid within the time provided under Paragraph (c) Section 1208, the Tax Commission shall levy and collect a penalty for such delinquency in the amount of ten per centum (10%) of the tax due. Such penalty shall be collected and apportioned in the same manner as is the tax itself, and the Tax Commission may enter an order directing the suspension of the charter or other instrument of organization, under which the corporation, association or organization may be organized, and the forfeiture of all corporate or other rights inuring thereunder.

* * *

"(c) Each trustee, director or officer of any such corporation, association or organization, whose right to do business within this State shall be so forfeited, shall, as to any and all debts of such corporation, association or organization, which may be created or incurred with his knowledge, approval and consent, within this State after such forfeiture and before the reinstatement of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such trustees, directors and officers of such corporation, association or organization were partners. Any corporation, association or organization whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any court of this State, except in a suit to forfeit the charter of such corporation, association or organization. In any suit against such corporation, association or organization on a cause of action arising before such forfeiture, no affirmative relief shall be

granted to such corporation, association or organization unless its right to do business in this State shall be reinstated as provided herein. Every contract entered into by or in behalf of such corporation, association or organization, after such forfeiture as provided herein, is hereby declared to be voidable.

* * *

"(f) After the issuance of such order of suspension and forfeiture by the Tax Commission, the charter or other instrument of organization may only be revived and reinstated upon the payment of the accrued fees and penalties and a reinstatement fee in the amount of Five Dollars ($5.00), and a showing by the corporation, association or organization of a full compliance with the laws of this State. Such payment of accrued fees and penalties must be made prior to the expiration of the time provided in such charter or other instrument of organization for the life of such corporation, association or organization."

18 O. S. 1961 § 1.198a

"Whenever the Secretary of State receives from the Oklahoma Tax Commission any order suspending or forfeiting the charter of or the right of any corporation to do business in this State, as provided in Section 13 of House Bill No. 55 of the Twenty-second Legislature, he shall give notice to the corporation, stating that he has suspended the Articles of Incorporation or Articles of Domestication, as the case may be. If prior to the expiration of one (1) year from the date the notice was sent the corporation presents satisfactory proof that the Oklahoma Tax Commission has, as provided in the Oklahoma Franchise Tax Law, reinstated the charter or right of the corporation to do

business in this State, the Secretary of State shall revoke his suspension. But if the corporation does not, within the year's time indicated above, present such proof, the Secretary of State shall revoke and cancel the Articles of Incorporation or Articles of Domestication, as the case may be, after mailing to the corporation, thirty (30) days prior to the expiration of the year's time, a notice that such revocation and cancellation will occur on a date stated in the notice."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 17(b)

"*Capacity to Sue or be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a)."